Supreme Court, U.S.
FILED

011611 APR 29 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

ROMALLUS O. MURPHY, DAVID M. DANSBY, JR., and JAMES DICKENS,

Petitioners,

v.

THE CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID M. DANSBY, JR.
P.O. Box 21746
Greensboro, NC 27420
(336) 274-3785

ROMALLUS O. MURPHY*
P.O. Box 20383
Greensboro, NC 27420-0383
(336) 274-3785

Attorneys for Petitioners

* *Counsel of Record*

173764

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the ex parte consistently selected statements taken out of context of a confidential letter written to client by one of her attorneys and filed by client in opposition to attorneys motion to withdraw could be used as the basis for imposition of the sanction of attorneys fees against attorney without a hearing conflicts with relevant decisions of the U.S. Supreme Court requiring a hearing?

2. Whether the U.S. Court of Appeals for the Fourth Circuit sanctioned a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of the supervisory powers of the U.S. Supreme Court where it failed to require a hearing prior to the imposition of sanctions of attorneys fees against the plaintiffs's attorneys?

3. Whether the U.S. Court of Appeals for the Fourth Circuit sanctioned a departure from the accepted and usual course of judicial proceeding so as to call for the exercise of the supervisory powers of the U.S. Supreme Court when it upheld a decision of a Magistrate Judge to impose the sanction of attorneys fees against plaintiff's lawyers in a Title VII case where the Magistrate Judge failed to apply standards enunciated by decisions of the U.S. Supreme Court with respect to the hearing appropriateness of sanctions and the amount of the sanctions?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Blue v. U.S. Dept. Of Army, 914 F.2d 525 (4th Cir. 1990) 7

Chambers v. Nasco, Inc., 501 U.S. 32, 111 S. Ct. 2123 (1991) 5, 8

Christianburg Garment Co. v. EEOC, 432 U.S. 412, 98 S. Ct. 694 (1978) 6, 7

DeBauchi v. Trani, 191 F.3d 499 (4th Cir. 1999) .. 5, 8

Griggs v. Duke Power Co. 401 U.S. 424 (1971) ... 9

In Re Gsand, 153 F.2d 1001 (3d Cir. 1946) 6

In Re Kuntsler, 914 F.2d 505 (4th Cir. 1990) 8, 9

Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S. Ct. 2455 (1980) 4

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343(3) 1

28 U.S.C. § 1343(4) 1

28 U.S.C. § 1927 ..... 1, 5

42 U.S.C. § 1988 1

42 U.S.C. § 2000e-5(f) 1

42 U.S.C. § 2000e-5(k) 1

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated And Decided November 6, 2001 ..... 1a

Appendix B —Memorandum And Order And Judgment Of The United States District Court For The Western District Of North Carolina, Charlotte Division Dated And Filed March 13, 2001 ..... 6a

Appendix C — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Dated And Filed January 29, 2002 ..... 17a

Appendix D — Relevant Statutes 20a

OPINIONS BELOW

The Order of the Court of Appeals affirming the judgment of the Magistrate Judge is produced in Appendix A. The Order of the Magistrate Judge is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on November 6, 2001. A Petition For Rehearing was timely filed. An Order denying the Petition For Rehearing was entered on January 29, 2002. (Appendix C)

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the U.S. District Court was invoked pursuant to 28 U.S.C. §§ 1343(3) and (4); 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1927; 42 U.S.C. § 1988; 42 U.S.C. § 2000e-5(k). (Appendix D)

STATEMENT OF THE CASE

The petitioners are attorneys who filed a Title VII suit on behalf of the plaintiff. The plaintiff having alleged that she as an employee of the defendant hospital she was appointed Director of the Call Center which basically did

telephone intake or admission of potential patients. That the plaintiff set up the Call Center and developed the forms to be used by the Call Center Counselors.

Defendant Hospital merged with another facility that did similar work as the plaintiff's center. New employees who were mostly white came on board. These employees had Master Degrees or Nursing Degrees. These white employees resisted being supervised b the plaintiff. The defendant company then changed the requirement of the job that the plaintiff had been performing to require a Masters Degree or a Registered Nursing Degree. The plaintiff only had a bachelors degree and her employment was thus terminated.

Thinking that the decision to eliminate the plaintiff's job was racial and that the change in the job requirement was pretextual, the petitioner filed suit on the plaintiff's behalf alleging racial discrimination under Title VII.

Prior to the initiation of the lawsuit the petitioners had reviewed copies of charges filed with the EEOC by the plaintiff and two other employees of the defendant. One of the employees was African-American and the other was a white female with a black husband. Both alleged that the action of the company constituted discrimination on the basis of race.

During the course of the discovery these two former fellow employees changed their statements and took the position of the company that the elimination of the jobs including the plaintiff's job was not racial. These were witnesses that the petitioners were counting on to help persuade the trier of fact that the charge in the job requirement were pretexual.

Petitioners reassessed the plaintiff's case and recommended settlement options. The plaintiff did not agree with the petitioners assessment. The petitioners then moved to withdraw as Counsel for the plaintiff. The plaintiff opposed the withdrawal of the petitioners and exhibited to the Magistrate Judge (before whom the motion to withdraw was pending) a copy of a letter written to her by one of the petitioners in confidence. The letter recommended settlement because the plaintiff could no longer rely on essential witnesses who had for unknown reasons turned on the plaintiff.

The plaintiff did not want to settle the lawsuit or accept the petitioners recommendations prompting the petitioners to withdraw. The Magistrate Judge denied the motion to withdraw without granting the petitioners a hearing basing his decision on excerpts from the letter from one of the petitioners , he concluded that the litigation was begun by the petitioners in bad faith and that the petitioners "multiplied the proceeding. . . . unreasonably and vexatiously" in the refusal to dismiss the plaintiff's lawsuit. The Magistrate Judge entered all of his rulings with out giving the petitioners the opportunity to have a hearing in which the petitioners could be afforded an opportunity to offer evidence on behalf of the plaintiff or the petitioners.

The Magistrate Judge also overlooked the fact that the petitioners had no authority to dismiss the plaintiff's case without the permission of the plaintiff. Only one complaint alleging discrimination against one plaintiff and an amendment to that complaint was filed by the petitioners. Only one deposition was taken by the petitioners.

REASONS FOR GRANTING THE WRIT

1. **THE COURT IN CONSIDERING STATEMENTS SELECTED TAKEN OUT OF CONTEXT FROM A CONFIDENTIAL LETTER WRITTEN TO CLIENT BY ONE OF HER ATTORNEYS AS THE BASIS FOR IMPOSITION OF THE SANCTION OF ATTORNEYS FEES AGAINST LAWYERS.**

2. **THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING SO AS TO CALL FOR AN EXERCISE OF THE SUPERVISORY POWERS OF THE U.S. SUPREME COURT WHEN IT FAILED TO REQUIRE THE MAGISTRATE JUDGE TO HOLD AN EVIDENTIARY HEARING PRIOR TO THE IMPOSITION OF SANCTIONS AGAINST PETITIONERS.**

The ex parte consideration of a letter written by one of the petitioners without giving the petitioners a hearing violated the petitioners right to a hearing established in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct. 2455 (1980).

In *Roadway Express, Inc. v. Piper, supra*, 447 U.S. 752, 100 S. Ct. 2455 (1980) at 2464, this Court said "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice an and opportunity for a fair hearing on the record." Though requested, this fundamental right to a hearing was denied petitioners.

In *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991) at 2136 this Court said "A court must, of course exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees . . ."

In this case the Magistrate Judge concluded from a letter written by one of the plaintiff's lawyers addressing the prospects of carrying the burden of persuasion in a pretext case that counsel for the plaintiff acted in bad faith and multiplied the proceedings unreasonably and vexatiously.

Even though the U.S. Court of Appeals for the Fourth Circuit ruled in *DeBauchi v. Trani*, 191 F.3d 499 (4th Cir. 1999) that "we conclude is a matter of law that the filing of a single complaint cannot be held to have so multiplied the proceedings unreasonably and vexatiously and therefore § 1927 cannot be employed for sanctions."

In not requiring the Magistrate Judge to follow its ruling and the ruling of the U.S. Supreme Court, the Fourth Circuit sanctioned an abuse of discretion and failed to properly exercise its supervisory powers and sanctioned the flouting of the rulings of the U.S. Supreme Court by rendering its decision in an unpublished opinion.

THE U.S. COURT OF APPEALS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT UPHELD THE IMPOSITION OF SANCTIONS IN THE FORM OF ATTORNEY'S FEES AGAINST THE PETITIONERS AND FAILED TO REQUIRE MAGISTRATE JUDGE TO FOLLOW THE DECISIONS OF THE U.S. SUPREME OF APPEALS FOR THE FOURTH CIRCUIT WITH RESPECT TO THE APPROPRIATENESS OF SANCTIONS AND THE AMOUNT OF THE SANCTIONS.

Failure to Dismiss.

One of the principal reasons the Magistrate Judge gave for the imposition of the sanction of attorney fees against the petitioner was the failure of the petitioner to dismiss the plaintiff's case. The petitioners contend that they had absolutely no authority to dismiss the plaintiff's case without her consent. *In Re Gsand*, 153 F.2d 1001 (3d Cir. 1946) at 1006 holds that "an attorney has no right to settle his clients case, nor to consent to a dismissal of it upon the merits which in effect is a release of the claim without express authority from his client."

FAILURE TO REQUIRE MAGISTRATE JUDGE TO APPLY USUAL STANDARDS IN CONSIDERATION OF ATTORNEY'S FEES

The standard for awarding attorneys fees to successful defendants is set out in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694 (1978) at 700 approving the language set out in *Carrion v. Yeshiua University*, 535 F.2d 722 at 727 which stated that "such awards should be

permitted 'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'"

Christianburg Garment Co. v. EEOC, at 700 says:

> We would qualify their words only pointing out that the term "meritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff ultimately lost his case and that the term "vexatious" in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him. In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's actions was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

In *Blue v. U.S. Dept. Of Army*, 914 F.2d 525 (4th Cir. 1990) the Fourth Circuit said

> we recognize that the presence of discrimination can be pervasive, but that proof of discrimination can be elusive. A "smoking gun" is often not to be found in a discrimination suit. Instead Title VII plaintiffs must often prove their cases by circumstantial evidence, or indirectly by showing that the employer's proffered explanation is unworthy of credence.

This case is such a case where the plaintiff could have prevailed on circumstantial evidence. The plaintiff's ability

to carry the burden of persuasion was understandably weakened when witnesses who once corroborated the plaintiff's claim for some reason decided to testify in direct contradiction to their earlier statements. This was something that neither the plaintiff or her attorneys could control.

In *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 at 2136 the Court said "A court must comply with the mandates of due process both in determining that the requisite bad faith exist and in assessing fees" clearly the Magistrate Judge did not accord the petitioners due process. The petitioners were given no opportunity to present evidence either in defense of their actions or in mitigation of the sanctions.

The petitioners were not afforded an evidentiary hearing to "contest the fee statement, there was no opportunity to address the severity of the sanctions. The Court of Appeals abandoned its own rule set out in its opinion in *In Re Kuntsler* 914 F.2d 505 (4th Cir. 1990) at 522 that the least severe sanctions adequate to serve the purposes of Rule 11 should be imposed.

In this case the petitioners filed one complaint and an amended complaint, and took one deposition. The Court of Appeals previously ruled in a published opinion "that the filing of a single complaint cannot be held to have multiplied the proceedings unreasonably and vexatiously and therefore that § 1927 cannot be employed to impose sanctions" *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999) at 512.

The Fourth Circuit also did not require the Magistrate Judge to apply its four prong test as to the amount of attorney's fees assessed. The standards set out in

In Re Kuntsler, supra, at 523, 524 include: (1) reasonableness of opposing parties attorney's fees; (2) "minimum to deter", (3) "ability to pay" and (4) "other factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved and other factors deemed appropriate in individual circumstances."

None of these factors were considered by the Magistrate Judge or the Court of Appeals. To fail to do so constituted at the minimum an abuse of discretion in departing from the standards set out by the Fourth Circuit in making such determinations.

The plaintiff's case at the outset appeared to be even stronger factually than the situation in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) where black employees applied for jobs previously restricted to white employees and were required to take a test or possess a high school diploma even though employees without high school education had demonstrated the ability to perform the restricted jobs.

CONCLUSION

That the Magistrate Judge in failing to follow the law and in arbitrarily assessing attorney fees upon the plaintiff's lawyers committed a gross abuse of discretion, a disregard for the law and a disregard for the facts and in doing so has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the supervisory powers of the court, and the reversal the decision of the U.S. Court of Appeals and the vacation of the Judgment of the Magistrate Judge.

Respectfully submitted,

ROMALLUS O. MURPHY*
P.O. Box 20383
Greensboro, NC 27420-0383
(336) 274-3785

DAVID M. DANSBY, JR.
P.O. Box 21746
Greensboro, NC 27420
(336) 274-3785

Attorneys for Petitioners

* *Counsel of Record*

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED NOVEMBER 6, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1538

ROMALLUS O. MURPHY; DAVID M. DANSBY, JR.,

Appellants,

and

VEAMAREA COBLE,

Plaintiff,

versus

THE CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY,

Defendant - Appellee,

and

CAROLINAS HEALTH SYSTEMS, INCORPORATED,

Defendant.

Appendix A

No. 01-1539

JAMES A. DICKENS,

Appellant,

versus

VEAMAREA COBLE,

Plaintiff - Appellee,

and

THE CHARLOTTE MECKLENBURG
HOSPITAL AUTHORITY,

Defendant-Appellee,

and

CAROLINAS HEATH SYSTEMS, INCORPORATED,

Defendant.

Appendix A

No. 01-1540

VEAMAREA COBLE,

Plaintiff - Appellant,

versus

THE CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY,

Defendant - Appellee,

and

CAROLINAS HEATH SYSTEMS, INCORPORATED,

Defendant.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Carl Horn, III, Chief Magistrate Judge. (CA-99-236-3-H).

Submitted: September 21, 2001 Decided: November 6, 2001

Before WILKINS, LUTTIG, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Veamarea Coble, Appellant Pro Se. Romallus O. Murphy, Greensboro, North Carolina; David M. Dansby, Jr., Greensboro, North Carolina; James Antone Dickens, Jr.,

Appendix A

LAW OFFICES OF JAMES A. DICKENS, Greensboro, North Carolina, for Appellants. David Lee Terry, Robert Blakeney Meyer, MCGUIREWOODS, L.L.P., Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Romallus O. Murphy, David M. Dansby, Jr., James A. Dickens, and Veamarea Coble appeal from the magistrate judge's order granting in part Defendant's motion for attorneys' fees and costs in this employment discrimination action.* We have reviewed the record and the magistrate judge's order and find no reversible error. Accordingly, we affirm on the reasoning of the magistrate judge. *Coble v. Charlotte Mecklenburg Hosp. Auth.*, No. CA-99-236-3-H (W.D.N.C. filed Mar. 13, 2001; entered Mar. 15, 2001).

To the extent that Coble seeks to appeal the magistrate judge's previous order granting Defendant's motion for summary judgment on her complaint, we find that Coble's notice of appeal as to that order was not timely filed. Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, *see* Fed. R. App. P. 4(a)(1), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5) or reopens the appeal period under Fed. R. App. P. 4(a)(6). This appeal period is "mandatory and jurisdictional." *Browder v. Director, Dep't*

* The parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c) (1994).

of Corr., 434 U.S. 257, 264 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)).

The magistrate judge's order was entered on the docket on December 7, 2000; therefore, it was incumbent upon Coble to file her notice of appeal within thirty days of the court's order, i.e., January 8, 2001. Coble did not file her notice of appeal until April 12, 2001. We therefore dismiss her appeal as to that order for lack of jurisdiction.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION DATED AND FILED MARCH 13, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION 3:99CV236-H

VEAMAREA COBLE,

Plaintiff,

v.

CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY,

Defendant.

MEMORANDUM AND ORDER AND JUDGMENT

THIS MATTER is before the Court on "Defendant's Motion For Attorneys' Fees And Petition For Costs" (hereafter, "Defendant's Motion and Petition") and "Memorandum In Support . . ." (document #41), both filed January 22, 2001. "Plaintiff's Opposition . . ." and attached "Memorandum In Opposition . . ." were filed March 12, 2001.

Having carefully considered the arguments, the record, and the applicable authority, the undersigned will *grant* Defendant's Motion And Petition in substantial part; assess fees and costs against the Plaintiff personally; and assess two-thirds of the requested attorneys' fees against Plaintiff's *counsel* jointly and severally.

Appendix B

I. FACTUAL AND PROCEDURAL BACKGROUND

The Complaint in this action was filed June 8, 1999; alleging that the Plaintiff was a victim of racial discrimination during the course of her employment. The initial Complaint named the wrong Defendant (Carolinas Health Systems, Inc.), which counsel for the Defendant advised Plaintiff's counsel at the Initial Pretrial Conference conducted September 9, 1999. The Plaintiff was allowed thereafter to amend her Complaint to name the correct Defendant (Charlotte Mecklenburg Hospital Authority).

The Amended Complaint alleges disparate treatment based on the Plaintiff's race (specifically, failure to promote her to Amethyst Call Center Director, eliminating her job, failing to place her in another position, and ultimately discharging her). The Amended Complaint also alleges that the Defendant public hospital engaged in a "policy and practice" of racial discrimination.

The Defendant has vigorously defended itself throughout the almost two years this action has been pending, denying any wrongdoing whatever. In particular, the Defendant has produced evidence of non-racial business reasons why it upgraded the educational and other requirements for employment as an Amethyst Call Center counselor; evidence that its insurance carrier specifically requested the additional requirements; and evidence of the superior clinical and managerial experience of the individual chosen for the Director's position (Jennifer Ziccardi).

The evidence clearly shows, for example, that African-American counselors who met the race-neutral requirements to serve as Intake Counselors were retained and that a white

employee who did not meet those requirements was discharged. The evidence also clearly showed that the decision-maker regarding the elimination and upgrading of positions (Laura Thomas), including the Plaintiff's position, was the same individual who had *promoted* the Plaintiff to Call Center Coordinator eight months earlier.

Affidavits and other clear and convincing evidence of the above noted facts were provided to Plaintiff's counsel in a thorough and timely manner. In sharp contrast, neither in the written discovery nor in the deposition testimony was there *any* evidence produced of racial bias or discrimination.

On July 10, 2000, more than a year after the Complaint was filed and a few weeks before discovery was to end — no evidence of racial discrimination having been discovered to date — the Plaintiff moved to extend the discovery period. Although Plaintiff's counsel had by no means been diligent, and the Defendant understandably opposed the extension, the undersigned nevertheless gave counsels' allegations of a need for two more months to conduct "critical" discovery the benefit of the doubt. Accordingly, by Order dated July 27, 2000 (document #24), the discovery period was extended until August 30, 2000.

After having engaged the Court in yet another contested discovery dispute, however, Plaintiff's counsel did *no* further discovery during the extended period.[1] Indeed, Plaintiff's

1. Plaintiff's counsel defend their failure to conduct discovery during the extended period as due to Plaintiff's inability to pay for the expenses associated with the discovery. However, those are issues which counsel should have addressed long before the end of the nine months already allowed for discovery — particularly if, as they represented to the Court, the discovery was "critical" to their case.

counsels' *only* discovery during the *entire* eleven-month discovery period was propounded during a ten-day period in February 2000, namely: a single deposition on February 2 and interrogatories and requests for production, both dated February 12.

After doing almost no discovery for the eleven month period, and after having come forward with *no* substantial evidence of racial bias or discrimination, on August 28, 2000 Plaintiff's counsel offered to settle the Plaintiff's claims for a nominal amount ($2,500). Counsel for the Defendant presumed that Plaintiff's counsel had sought and obtained authority from their client, accepted the offer, and assumed the case had been settled.

On August 29, 2000, with permission of Plaintiff's counsel, Defendant's counsel mailed a "Confidential Settlement Agreement And Release" directly to the Plaintiff for her signature. In a cover letter, defense counsel explained that the Settlement Agreement was being sent upon authorization of her attorney, gave instructions on its execution and return, and advised that he would "release the settlement proceeds to [her] attorney" upon filing of a "Stipulated Dismissal" of this action.

On or about September 11, 2000, Plaintiff's counsel advised Defendant's counsel that "irreconcilable differences" had arisen with their client; that she, in fact, did not wish to settle her claims for $2,500; and that they intended to move to withdraw from further representation of the Plaintiff in this case. On September 15, 2000, "Plaintiff's Counsels' Motion To Withdraw" (document #25) was filed.

Appendix B

Although the Defendant did not oppose counsel's Motion To Withdraw, the Plaintiff was not so sanguine about her attorney's conduct or motion. To the contrary — and in direct contradiction to Plaintiff counsels' express representation to the Court — the Plaintiff unequivocally stated in a letter to the undersigned that her attorneys had made the settlement offer *without* her knowledge or consent; that she did *not* wish or intend to settle her claims on the terms they had negotiated; that she had *not* authorized their settlement offer; and that she *opposed* their motion to withdraw.

The Plaintiff attached a copy of an August 21, 2000 letter from one of her attorneys, David M. Dansby, Jr., in which he advised the Plaintiff that her chances of prevailing were "very remote" and "almost nil." Nevertheless, Mr. Dansby encourages the Plaintiff to take solace and comfort in the fact that her lawsuit has caused the Defendant hospital "to pay substantial amounts in lawyers's [sic] fees and deposition costs."

Based on Plaintiff's *counsels*' lack of investigation of the baseless allegations in the Complaint, their lack of diligence during the eleven months allowed for discovery, their negotiation of a nominal settlement without the knowledge or consent of their client, and their cynical view of the expenses proximately caused by their meritless claims, the undersigned denied counsels' Motion To Withdraw by Order filed September 25, 2000 (document #27).

On September 29, 2000, the Defendant filed its Motion For Summary Judgment and Memorandum In Support (documents ##28-29). After being given *two* extensions of time, "Plaintiff's Response To Summary Judgment" (document #35) was finally filed November 30, 2000.

Not surprisingly, as noted in Defendant's Reply Brief filed November 30, 2000 (document #36), Plaintiff's Response utterly failed to establish a prima facie case of disparate treatment and, in fact, abandoned the bold allegations in the Complaint of a "pattern and practice" of racial discrimination.

By "Memorandum and Order" filed December 4, 2000 (document #37), the Defendant's Motion For Summary Judgment was granted; the Complaint was dismissed with prejudice; and the Defendant was given forty-five (45) days to submit a Petition for Costs and Attorneys Fees, should it elect to do so.

The Defendant did elect to do so, and the instant Motion and Petition are now ripe for resolution.

II. DISCUSSION OF DEFENDANT'S MOTION AND PETITION

Generally speaking, "district courts have considerable discretion in awarding attorney's fees. . . ." *Colonial Williamsburg Found. v. Kittinger*, 38 F.3d 133, 138 (4th Cir. 1994) . *Accord Hensley v. Eckerhart*, 461 U.S. 424, 427-37 (1983); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 (4th Cir. 1995); *and Spell v. McDaniel*, 824 F.2d 1380, 1401 (4th Cir. 1987) . Indeed, as the Fourth Circuit put it in *Johnson v. Hugo's Skateway*, 974 F. 2d 1408, 1418 (4th Cir. 1992), "fee awards are reversed on appeal only if under all the facts and circumstances [the award] is clearly wrong." *Accord Daly v. Hill*, 790 F.2d 1071, 1085 (4th Cir. 1986) (noting that the court of appeals "has a duty to affirm an [attorney's fee] award which falls within the district court's broad discretion").

Appendix B

42 U.S.C. § 2000 (e-5(k) allows a district court to award reasonable attorneys' fees to the prevailing party in actions under Title VII of the Civil Rights Act of 1964. A district court is also authorized, pursuant to 42 U.S.C. § 1988, to award reasonable attorneys' fees to the prevailing party in actions under 42 U.S.C. § 1981. *See, e.g., Gilyard v. South Carolina Dept. of Youth Services*, 667 F.Supp. 266, 274 (D.SC. 1985). An additional statutory basis for awarding attorneys' fees is found in 28 U.S.C. § 1927. *See, e.g., Chaudhry v. Gallerizzo*, 174 F.3d 394, 410 (4th Cir. 1999). Finally, attorneys' fees may be recovered in the form of sanctions imposed by the court pursuant to its "inherent powers." *See, e.g., Davis v. Target Stores*, 87 F.Supp.2d 492, 494 (D.MD. 2000) .

A district court may in its discretion award attorneys' fees to a prevailing *defendant* in a Title VII (or § 1981) case upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421. *Accord EEOC v. Clay Printing Co.*, 13 F.3d 813 (4th Cir. 1994) (affirming $192,792.50 in attorney's fees and $15,348.92 in expenses for prevailing defendant; *and Glymph v. Spartanburg Gen. Hosp.*, 783 F.2d 476, 479 (4th Cir. 1986). This is precisely such a case.

In developing this standard, the Supreme Court recognized that Congress wanted to protect defendants from "burdensome litigation having no legal or factual basis." *Christiansburg Garment Co.*, 434 U.S. at 420. Although it cautioned against post-hoc reasoning, the Court directed that a plaintiff could be assessed his opponent's attorney's fees if the action itself was

frivolous, unreasonable or groundless, or if it continued to be litigated after it clearly became so. *Id.* at 422.

28 U.S.C. § 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess cost, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Federal courts also have the "inherent power" to award attorney's fees against a party or counsel who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *and Blue v. United States Department of the Army*, 914 F.2d 525, 533 (4th Cir. 1990). "The continuation of litigation of claims which have become frivolous has been held to amount to 'bad faith' justifying a fee award." *Davis*, 87 F.Supp.2d at 494 (citing *Colbert v. Yadkin Valley Telephone Membership Corp.*, 960 F.Supp. 84, 86 (M.D.N.C. 1997)). *Accord Blue*, 914 F.2d at 537 ("Dogged pursuit of a colorable claim becomes actionable bad faith once the attorney learns (or should have learned) that the claim is bound to fail.").

Applying these well settled principles to this case, it is clear that: (1) the Complaint was "frivolous, unreasonable, and without foundation" from the outset, that is, no substantial evidence was either available at the outset or *ever* produced in furtherance of its bold allegations (*e.g.*, a "pattern and practice" of discrimination) or its more specific ones ("disparate treatment" of the Plaintiff); (2) Plaintiff's *counsel* failed to adequately investigate their claims before filing the Complaint, and further failed to use reasonable diligence to discover whether there was an evidentiary basis for their

claims once the Complaint was filed; (3) Plaintiff's *counsel*, both by their lack of diligence before and after the Complaint was filed *and* by their refusal to dismiss baseless claims once evidence was produced which clearly demonstrated that the claims were without merit, "multiplie[d] the proceedings . . . unreasonably and vexatiously"; and (4) there is at least some evidence of bad faith on the part of Plaintiff's *counsel* in the letter from Mr. Dansby to the Plaintiff in which he concedes her chance of prevailing is "very remote" and "almost nil," but encourages her to take comfort in the "substantial amounts in lawyers's [sic] fees and deposition costs" she has caused the Defendant public hospital to incur.

Once it is determined that a party or a party's attorney should be assessed attorney's fees and expenses, the Court must determine what constitutes a "reasonable" award. *See, e.g., Alexander S. v. Boyd*, 113 F.3d 1373, 1388 (4th Cir. 1997); *and Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978).

The Defendant's attorneys (David L. Terry, Robert B. Meyer, and Michelle M. Price) have carefully documented the number of hours they spent on this case, and the nature of the specific work performed for their client. The undersigned has carefully reviewed these billing records and records of miscellaneous litigation expenses, and finds that the work and expenses were within the usual and customary range for the defense of employment discrimination claims in U.S. District Court for the Western District of North Carolina.

On the other hand, the undersigned concludes that an award of the full amount of requested fees would be disproportionate. This conclusion is based on the fact that

three (or more) attorneys, one paralegal, and one summer clerk all worked on this case (resulting in some duplication in excess of the already discounted amount); the fact that the hourly rates are all at the upper end of the applicable market range for attorneys of like experience; and the routine and ultimately baseless nature of the claims being defended. Accordingly, the undersigned will grant the request for expenses and costs in their entirety, but will reduce the amount of the attorney's fee award by one-third.

III. ORDER AND JUDGMENT

FOR THE FOREGOING REASONS, and for the further reasons stated in Defendant's Memorandum In Support, "Defendant's Motion For Attorney's Fees and Petition For Costs" is **GRANTED IN PART,** to wit:

1. Defendant's Expenses ($1,431.52) and Defendant's Costs ($4,787.40) are hereby **ASSESSED** *against the Plaintiff personally.*

2. Defendant's attorneys' fees (two-thirds of the amount requested) in the amount of $48,970 are hereby **ASSESSED** *jointly and severally* against the three counsel for the Plaintiff: *Romallus O. Murphy*; *David M. Dansby*; and *James A. Dickens*.

3. Costs, expenses, and fees assessed herein are to be paid in full *within sixty (60) days of this Order*, with interest on any outstanding balance to accrue thereafter at an annual rate of six percent (6%).

Appendix B

4. The Clerk is directed to send a copy of this Memorandum And Order And Judgment to counsel for the parties; *and to the Plaintiff personally.*

SO ORDERED, ADJUDGED, AND DECREED, this 13th day of March 2001.

s/ Carl Horn, III
CARL HORN, III
Chief U.S. Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 29, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1538
CA-99-236-3-H

ROMALLUS O. MURPHY; DAVID M. DANSBY, JR.,

Appellants,

and

VEAMAREA COBLE,

Plaintiff,

v.

THE CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY,

Defendant - Appellee,

and

CAROLINAS HEALTH SYSTEMS, INCORPORATED,

Defendant.

Appendix C

No. 01-1539
CA-99-236-3-H

JAMES A. DICKENS,

Appellant,

v.

VEAMAREA COBLE,

Plaintiff - Appellee,

and

THE CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY,

Defendant - Appellee,

and

CAROLINAS HEALTH SYSTEMS, INCORPORATED,

Defendant.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

Appendix C

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — RELEVANT STATUTES

28 U.S.C. § 1927 Counsel's liability for excessive costs.

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. June 25, 1948, c. 646, 62 Stat. 957.

42 U.S.C. § 1988

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 . . . . or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000 (e-5(k)

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.